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Unpacking the Debate on Climate Justice and Equity (Part I)

Posted on [December 11, 2014](#) by [Annalisa Savaresi](#)



By Annalisa Savaresi

December 2014: 'Climate justice' has attracted growing attention in the debate on the future of the climate regime. But what does this elusive term actually mean? This blogpost explores the legal complexity underlying the debate on climate justice and its relationship with equity and human rights discourses, suggesting how benefit-sharing may be conceptualized as a means to address climate justice.

What is climate justice?

The term climate justice has been used to refer to distributive considerations associated with the impacts of climate change and climate change response measures. In a controversial monograph published in 2010, [Posner and Weisbach](#) argue that international climate law should not reflect principles of corrective or distributive justice. The authors note that competing claims about justice are largely responsible for the failure to agree on international action to tackle climate change. They therefore suggest that climate justice arguments be left out of the climate regime altogether.

Numerous [other authors](#), however, have noted how the climate regime inherently deals with the distribution of resources for climate change mitigation and adaptation, as well as the allocation of shares in a global carbon budget. These authors conclude that solving the climate problem is impossible without addressing questions of distributive justice, most notably those concerning the transfer of capacity, finance and technologies to tackle climate change (so-called means of implementation).

Prominent actors, like the UN Secretary General Special Envoy on Climate Change Mary Robinson, have long [advocated](#) for an equitable sharing of the burden and benefits of climate stabilization based on the protection of human rights

The debate on climate justice has thus been progressively linked with that on equity in the climate regime and the protection of human rights, and ultimately revolves around how to share the benefits and burdens of a global transition to low-carbon societies. The next sections provide an overview of how these matters have been addressed in the negotiations on the future of the climate regime.

Climate change and equity

Equity concerns have commanded increasing attention at all levels of climate governance. In its latest report, the [International Panel on Climate Change](#) has emphasised how equity should be used as a basis for assessing various climate policy options. Two key equity questions emerge here: how to address imbalances between States' capacities to tackle climate change; and how to temper the impact of climate change response measures on vulnerable segments of the population in developed and developing countries alike.

Equity is explicitly included in the principles guiding the Parties in achieving the objective of the 1992 [United Nations framework Convention on Climate Change](#) (UNFCCC) (Article 3.1). The main operationalization of equity and the core distributive paradigm in the climate regime is the principle of common but differentiated responsibilities. The interpretation of this principle in international law varies, and has led to [diverse arrangements](#) concerning the allocation of States' obligations in international environmental agreements.

The UNFCCC has applied this principle by drawing a neat distinction between developed and developing country Parties (UNFCCC, [Annex I](#)) applied for all core elements of the climate regime: mitigation, adaptation and means of implementation. The Convention specifically provides that the extent to which developing country Parties implement their commitments depends on developed country Parties' effective transfer of financial resources and technology, acknowledging that economic and social development and poverty eradication are the "first and overriding priorities of the developing country Parties" (UNFCCC, Article 4.7).

Following this rationale, with the 1997 [Kyoto Protocol](#) to the UNFCCC a relatively small group of developed countries undertook binding emission reduction targets that were expected to be reviewed over time. After the end of the first commitment period, however, it has proven impossible for some developed country Parties (e.g. Japan, New Zealand and the Russian Federation) to agree to new targets under the Kyoto Protocol, whereas others (Canada and the United States) are not Parties to the Protocol at all. This situation has left the European Union and a few other developed countries, including Australia, Norway and Switzerland, in the uncomfortable position

of being the sole Parties with emission reduction targets under the climate regime. Emission reductions in these countries alone, however, are vastly inadequate to achieve the objective of the Convention. The Intergovernmental Panel on Climate Change has on several occasions clarified that to successfully tackle climate change, both developed and developing countries need to reduce their emissions.

At present there is lively debate over how equity and common and differentiated responsibilities should be reflected in the new climate agreement, due to be adopted by the end of 2015 (2015 agreement). UNFCCC Parties agree that their future efforts should be undertaken “on the basis of equity and common but differentiated responsibilities and respective capabilities,” and take into account “the imperatives of equitable access to sustainable development” ([Decision 1/CP.18](#), at 2). Disagreement on the interpretation of the latter terms, however, has been a major bottleneck preventing progress towards the adoption of the 2015 agreement.

In the ongoing negotiations under the [Ad Hoc Working Group on the Durban Platform for Enhanced Action \(ADP\)](#) views on how to differentiate between Parties’ commitments in the 2015 agreement appear irreconcilable. At one end of the spectrum, numerous developed and developing countries agree on the need to move beyond the ‘bifurcated approach’ to the differentiation of Parties’ obligations contained in the UNFCCC and the Kyoto Protocol. On the other, some developing countries vehemently oppose ‘rewriting’ existing differentiation parameters.

On virtually all issues addressed by the ADP a widening rift exists between the position of a ‘progressive’ fringe of developing country Parties (willing to move beyond differentiation as enshrined in the UNFCCC) and the intransigent position of those that simply refuse to entertain any change. For example, while some developing countries suggest encapsulating South-South cooperation in the 2015 agreement, others firmly oppose any move beyond differentiation logics embedded in the UNFCCC and the Kyoto Protocol. Thus, a broad front of developing countries maintains that the understanding of equity in the 2015 agreement should not significantly depart from that presently embedded in the climate regime.

In sum, in climate negotiations, the debate on the distribution of the burdens concerning climate change action is subject to divergent interpretations, depending on Parties’ priorities, national circumstances and material interests. These considerations have increasingly intertwined with those concerning the impact of climate change on the protection of human rights.

Climate change and human rights

The Human Rights Council has increasingly drawn attention to the need to take into account the human rights implications of climate change impacts and climate change response measures. Human Rights Council Resolutions [10/4](#) (2009), [18/22](#) (2011) and [26/L.33](#) (2014) have emphasized the potential of human rights obligations,

standards and principles to “inform and strengthen” climate change policymaking, by promoting “policy coherence, legitimacy and sustainable outcomes.” The [Independent Expert on Human Rights and the Environment](#) has also recently released a [report](#) on the human rights threatened by climate change and the human rights obligations relating to climate change.

So far there has been little uptake of these human rights considerations in international climate change law-making. In its sole [reference](#) to human rights to date, the UNFCCC Conference of the Parties (COP) has generically recognized that Parties should fully respect human rights “in all climate change related actions.” ([Decision 1/CP.16](#), at 8)

This important specification gives little guidance on how to concretely pursue synergies between the climate regime and human rights law. In 2014 the Human Rights Council called on all States to “enhance international dialogue and cooperation” in relation to the impacts of climate change on the enjoyment of human rights, encouraging relevant special procedures mandate holders to “give consideration” to the issue of climate change and human rights within their respective mandates – Resolution [26/L.33](#) (2014).

Most likely as a result of this exhortation, the Human Rights Council Special Procedures mandate-holders called on the UNFCCC Parties to “ensure full coherence” between their human rights obligations and their efforts to address climate change in a recent [Open Letter to UNFCCC State Parties](#). More specifically, they invited State Parties to:

- include language in the 2015 agreement asserting that “Parties shall, in all climate change related actions, respect, protect, promote, and fulfil human rights for all”;
- launch a work program to ensure that human rights are integrated into all aspects of climate actions;
- refrain from viewing the responsibilities of State Parties in all of the above respects as stopping at their borders.

This line of argumentation belies some legal complexities. First, not all UNFCCC Parties have ratified human rights treaties and adherence to the UNFCCC cannot become a means to impose upon States obligations that are enshrined in treaties they have not ratified. Furthermore, human rights instruments have considerable [jurisdictional limitations](#), which are due to the fact that human rights obligations inherently deal with the relationship between States and individuals or entities within their ‘effective control’. It is, in other words, difficult to argue that States have specific obligations to undertake positive action to secure the protection of human rights associated with climate change impacts beyond their territorial boundaries. Therefore, whilst human rights considerations have important implications on how to

address equity in climate action *within States*, their added value to addressing equity *between States* is more doubtful.

Even bearing these legal complexities in mind, there is much scope to consider States' human rights obligations towards those in their jurisdiction (i.e. within States), in relation both to the impacts of climate change and the implementation of climate change response measures. There is furthermore some scope to use human rights law as a lens to scrutinize how UNFCCC Parties will address the matter of so-called 'loss and damage' associated with the impact of climate change in developing countries that are particularly vulnerable to its adverse effects (i.e. between States).

The most viable approach to better integrate human rights considerations in the climate regime would be to draw attention to the human rights obligations UNFCCC Parties have already committed to. In this regard, the 2014 [International Law Association](#) (ILA) Legal Principles Relating to Climate Change suggest that in the implementation of its obligations under the climate regime each Party to the UNFCCC should "formulate, elaborate and implement international law relating to climate change in a mutually supportive manner with other relevant international law" (Draft Article 10.1). The Legal Principles make specific reference to human rights law:

"States and competent international organisations shall respect international *human rights* when developing and implementing policies and actions at *international, national, and subnational levels* regarding climate change. In developing and implementing these policies and actions, States shall take into account the differences in vulnerability to climate change of their populations, particularly indigenous peoples, within their borders and take measures to ensure that all their peoples' rights are fully protected" – Draft Article 10.3(b).

The insertion of such a clause in the 2015 agreement would be instrumental in ensuring that the agreement is not interpreted in ways incompatible with States' extant human rights obligations. It would, however, be unrealistic to think that the introduction of such a clause would be a panacea, solving all the human rights concerns raised by climate change.

A 2014 [report](#) by the International Bar Association suggests a series of more ambitious steps to better integrate human rights considerations in international climate governance:

- Legal recognition for a new universal human right to a safe, clean, healthy and sustainable environment;
- Creation of a new international dispute resolution structure for climate change issues, including a new specialist International Court on the Environment;
- Greening bilateral investment treaties and free trade agreements to include State and investor party obligations to comply with environmental laws, climate

change commitments and to provide precedence to environmental and climate friendly laws over conflicting trade measures;

- The issuing of World Trade Organisation guidelines reassuring States that trade-related measures motivated by climate concerns will not fall foul of WTO trading rules, and that economic subsidies be rebalanced in favour of climate-friendly technologies and against fossil fuels;
- Inclusion of a cumulative carbon budget in the United Nations Climate Change Multilateral Framework to stay within a 2°C temperature rise limit;
- Increasing corporate responsibility to recognise how climate change impacts on human rights and to implement policies to achieve greater environmental awareness and greater corporate/regulator liaison on group-wide greenhouse gas measurement, reporting and disclosure; and
- Using the UN Universal Periodic Review process to highlight climate justice concerns for developing countries.

While Parties to the climate regime have not considered these ambitious suggestions, some cautious steps have been taken to address the human rights and equity considerations associated with the implementation of climate change response measures in the context of REDD+ and climate finance (this will be discussed in a forthcoming BENELEX blogpost 'Climate Justice, Part II').

Outlook

The debate on climate justice ultimately boils down to the question of how to secure a transition to low-carbon economies on fair and equitable terms. In this connection, thinking of how the benefits (rather than the burdens) of climate action can be shared may provide a more constructive approach to international climate governance. In particular, benefit-sharing may be conceptualized as a means to engender climate justice both between States and within States. Between States, a focus on benefit-sharing could provide a lens to look afresh at the interpretation of equity and common but differentiated responsibilities in the 2015 agreement. Within States, benefit-sharing can be used as part of a human rights-based approach to address the impact of climate change and climate change response measures. Framing these questions in terms of benefit-sharing goes beyond entrenched logics in climate negotiations and provides a potentially useful perspective to bring about new solutions to the distributive justice questions that emerge in climate governance.

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